APPEAL NO. 93133

On January 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing was held pursuant to Texas Workers' Compensation Commission Appeal No. 92643, decided December 7, 1992, wherein the Appeals Panel reversed the prior decision of the hearing officer in Docket No. HL-92-058415-02-CC-HL41 (Hearing 02) and remanded the case to the hearing officer for further development of the evidence, as appropriate, and consideration of the evidence on the issue of whether the claimant has had disability from his work-related injury of (date of injury) on and after August 25, 1992. The claimant and the employer's insurance carrier appeared at the hearing and presented evidence and argument. The appellant (employer herein) did not appear at the hearing. The hearing officer determined that the claimant had disability from August 25, 1992 until November 3, 1992, resulting from his (date of injury) work-related injury, and that he was entitled to the temporary income benefits which the carrier had paid him for that period of disability.

The employer filed a "Request to Nullify and Reschedule Remanded CCH," alleging that neither it nor the carrier were furnished with a written notice of the hearing on remand; that it was not informed at all of the hearing on remand; that the carrier was informed verbally of the hearing on remand, but not within 20 days before the hearing; that the hearing officer was informed and was aware that it had not been notified of the hearing on remand and conducted the hearing anyway; and that the hearing officer admitted new documents "presented by the other party" that had not been exchanged with it. The employer requests that the Texas Workers' Compensation Commission (Commission) reschedule another hearing on remand in a manner that does not violate the 1989 Act.

The claimant responds that he does not think another hearing is needed because the employer was not involved in the disability issue. The carrier did not file a request for review but did file a response to the employer's request in which the carrier stated that it was satisfied with the hearing officer's decision and that it does not take a position with regard to the employer's appeal, but does not oppose the employer's appeal. The carrier stated that it does not know whether due process was met or was required vis-a-vis the employer in this case.

DECISION

Finding that the employer was not a party to the hearing on remand, the employer lacks standing to appeal the decision of the hearing officer and its appeal is dismissed. We also conclude that the employer's points on appeal do not present reversible error.

A brief review of the procedural background of the case is in order. The claimant claimed that he injured his back at work on (date of injury). The carrier accepted liability for

the claimant's injury and the employer contested compensability under Article 8308-5.10(4). On September 15 and 23, 1992, a consolidated hearing was heard by the hearing officer. One case, Docket No. HL-92-058415-01-CC-HL41 (Hearing 01) involved the employer's contest of compensability. The claimant and the employer agreed that the issue to be determined by the hearing officer was whether the claimant sustained an injury in the course and scope of his employment on (date of injury). The other case was Hearing 02 in which the claimant and the carrier agreed that the issue was whether disability still exists. The carrier referred to the issue as whether the claimant had current disability. The claimant, employer, and carrier were all present at the consolidated hearing and presented evidence and argument. The hearing officer issued two separate decisions, one for Hearing 01 and one for Hearing 02. In Hearing 01, the hearing officer determined that the claimant sustained a work-related injury to his back on (date of injury), the employer appealed the decision, and the Appeals Panel affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 92583, decided December 7, 1992. In Hearing 02, the hearing officer said in his decision that the issue was whether the claimant had reached maximum medical improvement (MMI) and found that he had not. The carrier appealed the decision asserting that the hearing officer had not addressed the issue of current disability. The Appeals Panel reversed the hearing officer's decision and remanded the case to the hearing officer for further development of the evidence, as appropriate, and consideration of the evidence on the issue of whether the claimant has had disability from his work-related injury of (date of injury) on and after August 25, 1992 (the date he went to the hospital after having been released to return to modified work and having worked for about three months). As previously noted, on remand the hearing officer determined that the claimant had disability from August 25, 1992 to November 3, 1992. Neither the carrier nor the claimant has appealed that decision. However, the employer has filed its "Request to Nullify and Reschedule Remanded CCH."

There is no evidence in the record of a written notice of the hearing on remand to the claimant, the carrier, or the employer. The claimant and the carrier appeared at the hearing on remand and no mention was made concerning any absence of notice to them of the hearing. Ms. J, a Commission Ombudsman, was at the hearing on remand. The hearing officer said that he understood that the employer had requested Ms. J to be available to assist the employer, and Ms. J said that that was correct and that she had spoken to the employer, Mr. V, the day before the hearing and gave him the date and time of the hearing. The hearing officer noted that the employer was not present at the hearing. Ms. J said she was led to believe that the employer was going to appear at the hearing and requested her assistance. The hearing officer then stated "you [Ms. J] had on behalf of the employer, Mr. V, filed a letter on his behalf stating his desire that this matter be postponed to a later day because he had not been notified of the hearing and that his employer bill of rights was being violated." Ms. J said that was correct and added "that was upon his [Mr. V] request." The hearing officer then stated that "[i]nasmuch as the employer is not a party in this particular proceeding we will proceed on with the taking of evidence in this particular case."

The letter from Ms. J was not made a part of the record. A copy of it is attached to the employer's appeal.

Article 8308-6.42(b) provides as follows:

(b)The appeals panel may:

(1)affirm the decision of the hearing officer;

(2)reverse that decision and render a new decision; or

(3)reverse that decision and remand no more than one time to the hearing officer for further consideration and development of evidence. The hearing on remand shall be accelerated and the commission shall adopt rules to give priority to the hearing over other proceedings.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.18 (Rule 142.18: Special Provisions for Cases on Remand from the Appeals Panel) provides in pertinent part as follows:

(a)Priority setting for case on remand from appeals panel. When the appeals panel reverses a hearing officer's decision and remands the case for further consideration, the commission shall set the hearing to be held within 30 days of the date of the appeals panel's decision.

(b)Notice of hearing. After setting a hearing under this section, the commission shall furnish, by first class mail or personal delivery, written notice of the date, time and location to the parties. The notice shall be furnished at least 20 days before the hearing.

Article 8308-5.10 is the Employer Bill of Rights which provides as follows:

Employer Bill of Rights. Immediately on receiving notice of injury or death from any person, the commission shall mail to the employer a description of the services provided by the commission, the commission procedures, and the employer's rights and responsibilities under this Act. The commission is not required to provide this information to an employer more than once in a calendar year. The information provided to the employer under this section shall include a clear statement of the following rights of the employer:

(1)the right to be present at all administrative proceedings relating to an employee's

claim;

(2)the right to present relevant evidence relating to an employee claim at any proceeding;

(3)the right to report suspected fraud;

(4)the right to contest the compensability of an injury if the insurance carrier accepts liability for the payment of benefits;

(5)the right to receive notice, after making a written request to the insurance carrier, of any proposal to settle a claim or any administrative or judicial proceeding relating to the resolution of a claim; and

(6)the right to contest the failure of the insurance carrier to provide accident prevention services under Article 7 of this Act.

In Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, the employer filed a request for review of the hearing officer's decision that no bona fide offer of employment was made to the employee and that the employee had disability. The insurance carrier also filed an appeal in the case. In holding that the employer in that case lacked standing to appeal because the employer did not become a party to the benefit contested case hearing, the Appeals Panel stated that:

> Article 8308-6.41 (1989 Act) provides for the appeal of the hearing officer's decision by a "party." Our reading of the 1989 Act and pertinent rules promulgated by the Texas Workers' Compensation Commission (Commission) persuades us that Employer did not become a party in this matter. Articles 8308-5.10(1), (2), and (4) of the 1989 Act (Employer Bill of Rights) permit an employer the rights to (1) "be present at all administrative proceedings relating to an employee's claim; (2) to present relevant evidence relating to an employee claim at any proceedings; [and] (4) to contest the compensability of any injury if the insurance carrier accepts liability for the payment of benefits; . . ." In our view, while the exercise of an employer's rights to be present and to present relevant evidence may involve such employer as a participant in a proceeding, an employer does not become a party to a proceeding unless an employer contests compensability when the insurance carrier accepts liability. Article 8308-5.10(4).

Similarly, in Texas Workers' Compensation Commission Appeal No. 92137, decided May 20, 1992, the hearing officer determined that the employee had sustained an injury in the course and scope of his employment. Neither the insurance carrier nor the employee

appealed the decision, but the employer in that case did. The Appeals Panel held that the employer lacked standing to appeal because the employer did not become a party to the benefit contested case hearing. The Appeals Panel again pointed out that "an employer does not become a party [to a benefit contested case hearing] unless the insurance carrier accepts liability but the employer contests compensability, as indicated in Article 8308-5.10(4)." We further noted that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.1 defines an "appellant" as a "party" to a contested case hearing who is dissatisfied with the decision of the hearing officer, and that we had previously ruled in Appeal No. 92110, *supra*, that an employer who is not a party at the contested case hearing may not appeal the decision. Because no timely appeal had been filed by either party to the hearing, the Appeals Panel held that it had no jurisdiction to consider the appeal and the employer's appeal was dismissed. *See also* Texas Workers' Compensation Commission Appeal No. 92508, decided October 5, 1992; and Texas Workers' Compensation Commission Appeal No. 92479, decided October 26, 1992. In Appeal No. 92479, *supra*, the Appeals Panel held that the employer in that case, who did not become a party to the contested case hearing and was merely a participant, lacked standing to appeal and the employer's appeal was dismissed. In dismissing the appeal, the Appeals Panel observed in regard to the employer's contention that its attorney was not allowed to question a witness, that:

> Although not strictly necessary to the disposition of the case, we note that Article 8308-5.10(2) (Employer Bill of Rights) permits an employer the right to present relevant evidence relating to an employee's claim at any proceeding. Our dismissal of the appeal should not be interpreted as approval of the hearing officer's ruling denying the employer an opportunity to present evidence by calling the general contractor who had previously testified for the employee, as the employer's own witness.

In Texas Workers' Compensation Commission Appeal No. 92410, decided September 25, 1992, the Appeals Panel considered the right of the employer to present evidence in a hearing where the employer is not a party. The Appeals Panel stated that: "The employer is provided certain rights by statute (Article 8308-5.10 of the 1989 Act) including the right to present evidence at the hearing. This right is set forth without any condition and, as written, does not require that the employer be contesting compensability (when the carrier has accepted liability) in order to be able to present evidence. As such, the employer has the right to be a participant and to present evidence without first being made a party to the case." In a concurring opinion, Chief Appeals Judge Sanders observed that there is nothing in Article 8308-5.10 to indicate that it can be used by a carrier to circumvent procedural restrictions imposed on the carrier in the presentation of its case.

In Texas Workers' Compensation Commission Appeal No. 92378, decided September 14, 1992, the Appeals Panel stated that Article 8308-5.10(1) gives the employer the right to be present at all administrative proceedings relating to an employee's claim and

that the statute does not contain an exception which would permit the designated employer representative from being excluded from the hearing on the basis that "the rule" is invoked and the representative intends to testify. The Appeals Panel held that the hearing officer erred in not permitting an employer representative to remain in the hearing room during the course of the hearing, but determined that the hearing officer did not commit reversible error in that the carrier did not show how the hearing officer's ruling was reasonably calculated to cause and probably did cause rendition of an improper decision. The Appeals Panel noted that the carrier was permitted to present its case, including the testimony of its witnesses and introduction of documents.

The first question we address is whether the employer was a "party" to the hearing on remand so as to entitle it to written notice of the hearing on remand under Rule 142.18(b). Unquestionably, the employer was a party at the consolidated hearing held on September 15 and 23, 1992. The employer exercised its right to contest compensability under Article 8308-5.10(4) when the carrier accepted liability. However, in the unique circumstances present, we believe that the employer's party status was limited to the issue of whether the claimant sustained an injury in the course and scope of his employment. At the consolidated hearing the hearing officer said: "I take it that the employer will have evidence to the issue of compensability--that the carrier will have evidence about the issue of whether disability still exists and that the claimant will have evidence that will pertain or respond to both of those, is that correct?" The parties responded in the affirmative. The hearing officer specifically asked the employer if it agreed that the issue it was at the hearing to try "is the issue of whether or not an injury occurred to the claimant in the course and scope of his employment," to which the employer said "correct." In its opening statement at the consolidated hearing, the employer stated that its position was that the claimant could not have sustained an injury on (date of injury), and that he did not sustain an injury in the course and scope of his employment. The basis of the employer's position was that a time card indicated that the claimant did not start work on November 7th until after the time of day he said he was injured. The carrier said that its position at the consolidated hearing was that the claimant had no current disability. The hearing officer separated employer exhibits from carrier exhibits.

The hearing officer issued two separate decisions in the consolidated hearing. The decision in Hearing O1 was styled claimant v. employer and the hearing officer stated in the decision that the hearing was held to determine whether the claimant suffered a compensable injury on (date of injury). The hearing officer determined that the claimant had a work-related injury on (date of injury), and concluded that he suffered a compensable injury on that date. In its appeal of the hearing officer's decision in Hearing 01, the employer did not object to the hearing officer's statement of the issue to be determined in that hearing, and, in fact, reiterated its stated position at the hearing that the claimant could not have sustained an injury on (date of injury), and did not sustain an injury in the course and scope of his employment because the claimant was not at work at the time he claimed he was

injured. The Appeals Panel affirmed the hearing officer's decision in Appeal No. 92583. The decision in Hearing 02 was styled claimant v. carrier and the hearing officer stated in the decision that the issue was whether MMI had been reached. The carrier appealed that decision asserting that the hearing officer failed to address the issue of current disability and the Appeals Panel reversed and remanded Hearing 02 to the hearing officer for further consideration and development of evidence because the Appeals Panel determined that the hearing officer did not focus on the issue to be decided between the claimant and the carrier, that is, current disability. The employer did not attempt to appeal the hearing officer's decision in Hearing 02.

Considering the procedural history of the consolidated hearing, the positions of the employer and the carrier at that hearing, the position of the employer in its appeal of the Decision in Hearing 01, and the position of the carrier in its appeal of the decision in Hearing 02, we conclude that the employer was a party to Hearing 01 on the issue of whether the claimant sustained an injury in the course and scope of his employment, but that the employer was not a party to Hearing 02 on the issue of whether the claimant had current disability. Consequently, when Hearing 02 was reversed and remanded, the issue of current disability remained an issue between the claimant and the carrier, and the employer was not a party to the hearing on remand on that issue because it was not a party on the issue of current disability at the consolidated hearing.

Rule 142.18(b) provides that for cases on remand from the Appeal Panel, the Commission shall furnish written notice of the hearing to the parties. Since the employer was not a party to the hearing on remand, it was not entitled to written notice of the hearing from the Commission under Rule 142.18(b). However, under Article 8308-5.10(1) and (2), the employer has the right to be present at all administrative proceedings relating to an employee's claim and has the right to present relevant evidence relating to an employee claim at any proceeding. It is clear that an employer would not have an opportunity to be present at a hearing and to present evidence at a hearing unless it is notified of the hearing. Article 8308-5.10(5) appears to place the responsibility of giving notice of hearings on the carrier after the employer makes a written request to the carrier. That article provides that the employer has "the right to receive notice, after making a written request to the insurance carrier, of any proposal to settle a claim or any administrative or judicial proceeding relating to the resolution of a claim." We note that, pursuant to its rule making authority, the Commission adopted Rule 141.7 relating to Commission Actions After a Benefit Review Conference (BRC), and that Subsection (d) provides for notice of the contested case hearing to, among others, the employer, no later than eight days after the director of the hearings division receives the benefit review officer's report. No similar provision for providing notice of hearing to the employer (when the employer is not a party) is provided for in Rule 142.18(b) relating to cases on remand from the Appeals Panel. Consequently, the employer's right to receive notice of hearing on remand where the employer is not a party

to the hearing on remand, as opposed to notice of a hearing which is scheduled after a BRC, is the responsibility of the carrier under Article 8308-5.10(5), and the carrier's responsibility to give notice is conditioned on the employer making a written request to the insurance carrier. The employer does not assert, nor is there any indication, that the employer made a written request to the carrier to be notified of proceedings involving the claimant's claim. While we do not find merit in the employer's contention that the case should be remanded because it did not receive notice of the hearing on remand (assuming, without deciding, that a second remand would be permissible in these circumstances despite the statutory provision limiting the Appeals Panel to one remand), we believe that the better procedure would be for the Commission to notify the employer of a hearing on remand in a manner similar to the notice given to parties even where the employer is not a party to the hearing on remand in order to ensure that the employer has the opportunity to exercise its statutory rights under Article 8308-5.10.

Other factors also mitigate against a finding of reversible error in this case. The Commission sent the employer a copy of Appeal No. 92643 which remanded Hearing 02, and, from the Ombudsman's representations to the hearing officer at the hearing on remand, the employer was notified of the hearing on remand by the Ombudsman, albeit, only one day before the hearing. The employer chose not to be present, but rather requested a continuance, the granting of which is within the hearing officer's discretion. In view of the employer's right to be present at the hearing and its right to present evidence, the better course of action may well have been to grant a short continuance which, of course, would most probably have obviated the employer's assertion of lack of notice of hearing. However, the employer does not indicate what, if any, evidence it would have presented at the hearing on remand. The hearing officer incorporated the record of the consolidated hearing into the hearing on remand. The consolidated hearing took about 10 hours to complete and the hearing on remand took another hour and a half. It appears that the record relating to the issue of current disability was fully developed and that additional relevant and material evidence would probably not have been elicited from the employer had the employer been present at the hearing on remand.

The employer also asserts that the carrier was not given 20-days written notice of the hearing on remand. Presupposing that the employer's assertion is true, it is not a basis for reversal in this case since the carrier was present at the hearing, did not object to lack of notice at the hearing, and did not appeal the decision of the hearing officer. The employer further asserts that the hearing officer erred in admitting documents presented "by the other party" (which we take to mean the claimant) that had not been exchanged with the employer. Since the employer was not a party to the hearing on remand, no exchange of documentary evidence by the claimant to the employer was required. Article 8308-6.33(d) and Rule 142.13(c). We also note that the claimant introduced into evidence only one document that was not already in evidence at the consolidated hearing and that document indicated that he could return to work on November 3, 1992, which he did. Thus, the document was

actually favorable to the carrier's case.

The employer's appeal is dismissed for lack of standing to appeal the decision of the hearing officer on remand since the employer was not a party to the hearing on remand. No reversible error is found.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge